Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States

APPARAJAN GANESAN,
Petitioner,

v.

MIKE BRANNIGAN, MICHAEL UPSHAW, KELLI WARD, PATRICIA GRAHOVEC, RENEE HAWKINS, FAYE ROSS, AND GAYLE ANDERSON
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

Apparajan Ganesan, Pro Se
TDCJ #904088
Polunsky Unit
3872 FM 350 South
Livingston, TX 77351

July 8, 2008

QUESTION PRESENTED

Did Ganesan exhaust his administrative remedies?

LIST OF PARTIES

Pursuant to Supreme Court Rule 24 1(b), the following list identifies all of the parties before the Supreme Court of Texas.

Mike Brannigan, Michael Upshaw, Kelli Ward, Patricia Grahovec and Renee Hawkins were employees of various agencies of the State of Texas. Faye Ross and Gayle Anderson were private contractors who contracted with the Texas Department of Criminal Justice, and they were represented by a private attorney and not by the Texas Attorney General

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OPINIONS BELOW

The 100th District Court of Texas in Childress County, Texas, (Hon. David McCoy presiding) transferred venue to the 32nd District Court of Texas in Mitchell County, Texas (Appendix B). Subsequently, Judge McCoy was indicted (Appendix G). The 32nd District Court, Mitchell County, Hon. Glen Harrison presiding denied Ganesan's request for extension of time (Appendix C) followed by dismissal with prejudice, (Appendix D). The opinion of the 11th Court of Appeals of Texas is in Appendix A. The rulings on Petition for Review by the Supreme Court of Texas are in Appendices E and F.

JURISDICTION

The Supreme Court of Texas denied a Motion for Rehearing on January 11, 2008. This Court has jurisdiction pursuant to Supreme Court Rule 10 (b) and (c) [28 USC §1257].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the procedural and the substantial due process clauses of the Constitution of the United States, Amendments V and XIV, the Texas Constitution, Article 1, Sec. 19, the Civil

Rights Act, 42 USC §1983 and the PLRA 42 USC §1997e. In addition distinguishing the difference between a federal claim tried in a state court versus a federal claim tried in a federal court, the intervention procedure in a Texas court versus a federal court [Texas Rules of Civil Procedure, Rule 60, 61, and Federal Civil Judicial Procedure and Rules, Rule 24(a) and 24(b)], and the exhaustion rules required in a federal court versus a Texas state court (laws prior to PLRA passed in April 26, 1996, present version of the PLRA, and Texas Civil Practices Remedy Code Chapter 14 §14.005) are illustrated.

STATEMENT OF THE CASE

This case is a civil suit for damages and injunctive relief from improper DNA collection (TDCJ admitted so in Grievance #2002157289 Step 1 and 2 followed by a letter [see Appendix H]), for the attendant refusal to correct records and for continued multiple repetitions of same error by the threat of force.

BACKGROUND

Ganesan was convicted on a two count indictment for the solicitation of murder, one count

being overturned on appeal, *Ganesan v. Texas*, 45 S.W.3d 197. Ganesan was convicted under Sec. 15.01 of the Penal Code, which is not a DNA collectible offense. TDCJ erroneously recorded this as an offense under Sec. 19.02 of the Penal Code as attempted murder, which is a DNA collectible offense.

On May 9, 2002, while Ganesan was in the TDCJ Roach Unit, the medical department, under threat of force, took a sample of his DNA. Ganesan filed a Grievance. #2002157289, Step 1 & 2 and, in a letter dated June 19, 2002, TDCJ acknowledged that taking the DNA sample was wrong. The letter stated that the "DNA sample and all records pertaining to it have been destroyed." In an attempt to ensure that the record had, indeed been purged and that there would be no further attempts to illegally collect DNA sample, Ganesan filed this suit naming Brannigan and Upshaw of the Roach Unit, Ward and Grahovec Huntsville TDCJ employees, and CODIS Laboratory employee Hawkins on August 2, 2002 in Childress County under 42 USC §1983. However, due to his lack of understanding of how a Pro Se prisoner of the TDCJ system can file a civil suit, the actual filing was delayed until November 13, 2002. Childress Court informed Ganesan to wait until he completed his sentence to initiate service and proceed further.

Ganesan notes that, under case law (*Johnson v. Johnson*, 385 F.3d 503 [5th Cir. 2004]) Ganesan does not have to grieve the same issue over and over.

About late August, 2002, before the Nov. filing date, Ganesan moved to the Sander Estes Unit, Venus TX in Johnson County, and multiple attempts to collect his DNA were made but, when he protested, authorities there immediately sought guidance from Huntsville. In a note from R. Shufelt of the Sanders Estes Unit an error in the "crime code" in Ganesan's official computer records was found to be the root cause. Shufelt noted that he had been informed the error "had now been corrected" (Appendix I).

Subsequently, in August 2004, Ganesan was moved to the Neal Unit in Potter County. Another attempt was made to illegally obtain Petitioner's DNA, and Ganesan requested a temporary injunction. Then, in February 2005, Ganesan was moved again, this time to the Wallace Unit in Mitchell County. A similar attempt, with threats of force, parole denial, etc., was made by private contractors Fay Ross and Gale Anderson.

Investigation by Petitioner's free world caretaker, D. G. Marsh, 1031 Graham St., Bethlehem, PA, indicated that the "correction" mentioned by Shufelt was actually just a change in

crime code numbers. Apparently the change was that the use of different number to distinguish between his solicitation of murder crime (DNA sampling not required) and an attempt of murder crime (DNA sampling required) had been eliminated. Therefore, only by reading the words on the Confinement Sheet can a reviewer know that Ganesan was not required to supply a DNA sample. Since TDCJ Unit personnel, when determining if they should obtain a DNA sample, typically receive only the crime code number, the probability of a repeat of Appellant's experience is likely.

Faye Ross and Gayle Anderson made an appearance and had venue transferred to Mitchell County. Mitchell County District Judge signed a dismissal with prejudice order on March 23, 2006.

Appellate Court affirmed on May 10, 2007, stating Ganesan had failed to exhaust his administrative remedies. Even after being presented with US Supreme Court's ruling in *Jones v. Bock*, 127 S.Ct. 910 [2007], overruled Ganesan's motion for rehearing on June 21, 2007. The Supreme Court of Texas denied review on November 11, 2007 and denied a rehearing on January 11, 2008.

SUMMARY OF THE ARGUMENT

42 USC §1997e(a) is not applicable to a federal law claim in a state court. Ganesan had exhausted his administrative remedies on his prison related issues (as per *Jones v. Bock*, 127 S.Ct. 910 [2007] in accordance with VTCA Govt. Code 501.008.

ARGUMENT

State courts and federal courts have concurrent jurisdiction to hear constitutional claims under 42 USC §1983 (*Chambers v. City of Stillwater*, 821 F.Supp. 1284 [1993]; *Coffman v. Wilson Police Dept.*, 739 F.Supp. 257 [1990]; *Development Agency of City of San Bernadino v. Alvarez*, 288 F.Supp.2d 1112 [2003]).

The main goal of the civil rights act of 1871 (the precursor to 42 USC §1983) was to override the corrupting influence of the Klu Klux Klan and its sympathizers on the government and law enforcement agencies of the Southern states. One strong motivation behind its enforcement was grave congressional concern that the states had been deficient in protecting federal rights (emphasis is mine) (*Allen v. McCurry*, 101 S.Ct. 411, 449 US 90, 100 [1980]).

By enacting this section, Congress altered the balance of judicial power between state and federal courts by adding to the jurisdiction of the federal courts but not subtracting from the states (*Allen* @ 101 S.Ct.418). This addition to the jurisdiction of the federal courts opened the floodgates so that over 20% of the litigation in federal courts is brought by prisoners (*Jones v. Bock*, 127 S.Ct. 910, 914 n 1). Note that state courts have not demonstrated a new sensitivity to federal rights to lure prisoners back to state courts so that a similar argument would result in a flood of prisoner suits in state courts. The legal burden in federal courts explicitly limited the exhaustion doctrine of 42 USC §1997e(a) to federal claims tried in federal courts (*Laird v. Mattox*, 430 F.Supp.2d 636 [2006]; *Laird* @ 640 [Joint Explanatory Statement by House-Senate Committee of Conference 141 Cong. Rec. H13874-01, at H13928, Dec 4, 1995]: amended 42 USC §1997 as any suit brought under federal law by an inmate in federal court. US Congress was fully aware that a claim under 42 USC §1983 can be brought in state court or in federal court. By making the strict exhaustion goal of §1997a, Congress was aware that it was shifting the over 20% burden of the federal courts to the not so burdened judiciary of the state courts (900 federal district judges compared to 9000 state district judges and 14 circuit courts compared to over 700 state appellate courts and additional review at the state supreme courts) so inmates may be lured to litigate federal claims in state courts

under state rules. US Congress did not pretend that it had the authority to control the procedural and legislative behavior of the state legislatures and state judiciaries. In *Danforth v. Minnesota*, No. 06-8273 [2008], this court opined that while it has ample authority to control administration of justice in federal cases, especially in the enforcement of federal legislation, it has no comparable supervisory authority over the work of state judges.

Ganesan made a federal claim in a state court. State Appellate Court erred in applying 42 USC §1997e(a) to Ganesan's federal claim since 42 USC §1997e(a) is applicable only to a suit under federal law by an inmate in federal court.

Ganesan's federal claim in a state court is governed by VTCA Govt. Code §501.008, and, if informa pauperis (which Ganesan is NOT), by the provision of Chapter 14 of the Texas Civil Practice and Remedies Code.

Exhaustion is not a jurisdictional issue. It is an affirmative defense that must be pled by the defendant and may be responded to by plaintiff. Further, exhaustion is subject to waiver, estoppel and equitable tolling (*Almond v. Traver*, 468 F.Supp.2d 886, 896 [2006]). The primary purpose of exhaustion is to put prison officials on notice of a problem and not to give personal notice to individual prison officials that they may be sued

(*Jones* @ 127 S.Ct. 923). In Texas some problems are solved at the unit level (Step 1 Grievance). Others, as in this case as noted in the Step 1 response, are solvable only at the system wide level (Step 2). Neither the response nor the corrective action (or lack thereof, as the facts turn out to be in this case) prevents a prisoner from seeking judicial remedies, including monetary relief. "Clearly, the legislature foresaw that inmates would seek redress in courts because VTCA §501.008(d) is the requirement to exhaust the grievance procedure before initiating suit" (*Gordon v. Scott*, 6 S.W.3d 365 [1999]). "Further, a prisoner need not appeal a favorable resolution to his grievance to satisfy PLRA exhaustion requirement" (*Johnson v. Johnson*, 385 F.3d 503, 515 [2006]; *Abney v. McGinnis*, 380 F.3d 663, 668-669 [2004]; *Surrels v. Correctional Officers*, 245 F.3d 790 [2006]). In a nutshell, *Jones* focuses on "whether prison officials were made aware of the prisoner's issue" as a test of exhaustion.

The undisputed facts of this case are:

a. DNA was unlawfully collected,

b. Ganesan notified unit officials through Step 1.

c. step 1 response indicated problem could only be resolved through Step 2 (Step 2 office is central and has common oversight of all units of TDCJ),

d. Ganesan sought a Step 2 resolution,

e. TDCJ provided notification that DNA sample was destroyed and the error leading to his being forced to give it had been corrected,

f. unsure if copies of the DNA were made before the CODIS record was destroyed and even more unsure if TDCJ had corrected the record, Ganesan filed a lawsuit,

g. Ganesan's fears proved correct. At other units, TDCJ continued to make unlawful attempts to obtain his DNA. In each case, Ganesan notified trial court and, after some repetitions, requested injunctive relief, after which TDCJ would move Ganesan again, and the unlawful attempt and threats was repeated.

The TDCJ model coupled with the nuance of the Appellate Court ruling creates, in the asymptotic limit, an impossible predicament: Ganesan complains via the Step 1 and Step 2 process, TDCJ waits 179 days (the Step 1 plus Step 2 time limit is 180 days), then moves Ganesan to another unit and repeats its transgressions.

According to the Appellate Court, Ganesan should re-file Step 1 and Step 2, so that TDCJ gets another 179 days. Ganesan will be out of TDCJ confinement in Nov. 2008, and TDCJ has more than

100 units, so TDCJ never runs out of opportunities before Ganesan can exhaust his remedies. Further, the Appellate Court ruling make the Step 2 meaningless: what is the point of notifying central authorities if all they do is move Ganesan and get a free pass to repeating their transgressions through another actor? The law does not require, and the US Supreme Court concurs, that individual actors need to be put on notice; the issues only have to be brought to the notice of the authorities (Step 2 in Texas) (*Jones v. Bock*, 127 S.Ct. 910).

According to the US Supreme Court, the state grievance process rather than the PLRA should govern the exhaustion process (*Jones* @ 127 S.Ct. 913), so Ganesan looks to VTCA Govt. Code §501.008(a). State law defines Step 1 and Step 2: "... is the exclusive remedy available to relief against the department ...." (emphasis is mine). That is, the exhaustion process Step 1 and Step 2 is directed towards getting relief against the department, not individual officials. Further *Neuces County v. Ferguson*, 97 S.W.3d 205, 213-214 [2002], head notes 6 and 7, clearly states that when a state actor is sued in a 42 USC §1983 claim, two separate legal personages, namely the individual in his official capacity and the individual in his private capacity, are involved.

While the official in his official capacity may be the state itself (and hence may require an

exhaustion of remedies), the official sued in his individual capacity has no connection to the state and his conduct is subject to a reasonable person test. State is not liable in any manner for actions in the individual capacity against a defendant per state law, since such a legal personage is not the Department, exhaustion is not required. *Gordon v. Scott*, 6 S.W.3d 365, 370 [1999] comes to same conclusion re a prison official sued in an individual capacity.

Supreme Court, in *Jones v. Bock*, 127 S.Ct. 913 clarified that, unlike a habeas claim, in a civil rights action a court, faced with good and bad claims, responds positively to the good but not the bad. The Trial Court in Childress County, where the case was originally filed, informed Ganesan verbally through his caretaker Mr. Marsh that it would not hear the case until his release in Nov. 2008. Even if the Appellate Court is correct, the case should have been sent back to Childress County for further proceedings.

Defendants Ross and Anderson are not state officials and they are represented by a private attorney, not the state Attorney General. Under the circumstances, exhaustion of administrative remedies is not required. "Statute provision for screening prisoner litigation did not authorize dismissal of negligence and strict liability claims against officials of joint markets and distributors of

over the counter heart burn drug since they were not government officers" (*Shipley v. First Federal Savings and Loan Association of Delaware*, 619 F.Sup. 421 [1985]). The Fifth Circuit echoed the same in *Cozo v. Tangipahoa Parish Council – President Government*, 279 F.3d 273 [2002]). The test to use is "whether the state is liable for any damages caused" (*Hufford v. Rogers*, 912 F.2d 1338 [1990]). Ganesan submits that the liabilities of the official capacity legal personage or the individual legal personage of either Ross or Anderson per *Neuces County v. Ferguson*, 97 SW.3d 205, 213-214 [2003] would not cause monies to be paid out of the treasury of the State of Texas.

Stephens v. Correctional Services Corp., 428 F.Supp.2d 580, 583-584 [2006] is the analysis by a federal judge of how private actors operate under the color of state law in Texas while not enjoying sovereign immunity because they are not a state entity.

Texas courts seem to say that even after that state admitted error and Ganesan sued them in a court of law, the state could continue the same transgressions through official and private actors. Furthermore, Ganesan must continue filing for administrative relief until the day he is released from prison. Clearly, this is not the intent of the exhaustion of administrative remedies provision.

The Step 1 (in Appendix H) clearly requires "who you talked to" rather than "who do you intend to sue" buttressing the Supreme Court's ruling in *Jones v. Bock*, 127 S.Ct. 910, HN2, 911 [2007].

42 USC §1997e is a statue specifically designed by Congress to address the burden on the federal courts and spread it more evenly among state courts (*Laird v. Mattox*, 430 F.Supp.2d 236, 240 [2006]). A state, through its constitution, can offer its citizens more but not less freedom than the US Constitution. This court in *Danforth v. Minnesota*, No. 06-8273 [2008] opined "states are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." A federal claim such as a 42 USC §1983 action filed in a state court is procedurally governed by the Texas Constitution and the Texas Rules of Civil Procedure, unlike the same claim filed in a federal court where it is governed by the US Constitution and federal Rules of Civil procedure. In other words, while the "substantial" due process requirements might be the same, the procedural due process may be significantly different:

> Example 1 – Suppose a prisoner has filed a 42 USC §1983 claim in federal court. For another prisoner to intervene in it, a judge's permission is required. However, if the same claim were filed in a Texas court, intervention does not require the court's permission (Federal Civil

Judicial Procedure and Rules, Rules 24(a) and 24(b), Texas Rules of Civil Procedure, Rule 60, 61, and *San Juan 1990-A, L.P. v. Meridian Oil, Inc.*, 951 S.W.2d 159, HN6, 160 [1997]).

Example 2 – The exhaustion requirement, as it stands today and at the time of the filing of this suit requires a prisoner to exhaust administrative remedies completely before filing suit in a federal court (42 USC §1997e). However, if the same federal claim were to be litigated in a Texas court, upon notice to that court all proceedings can be stayed for 180 days (time period required for exhausting administrative remedies) until all administrative remedies are exhausted (Texas Civil Practice and Remedies Code, Chapter 14 §14.005(c); *Lewis v. Stephens*, 957 S.W.2d 879 [1997].

Example 3 – "Qualified immunity is a defense from both liability and suit" (*Heitschmidt v. City of Houston*, 161 F.3d 834 C.A. 5 [Tex. 1998]). In a §1983 action in a federal court, the denial of qualified immunity is subject immediately to interlocutory appeal (to avoid unnecessary expense of tax dollars) in a federal appellate court (*Mitchell v. Forsyth*, 472 US 511, 524-530, 105 S.Ct. 2806, 2814-2818, 86 L.Ed.Rd 411 [1985]). However, if same §1983 action is brought in a state court, such as Idaho, there is no recourse to an interlocutory appeal, the state will have to expend additional tax dollars to defend against the suit, and the state will have

to wait until appeal on all issues is made to appropriate state appellate court (*Johnson v. Fankell*, 520 US 911, 117 S.Ct. 1800, 1803-1807, 138 L.Ed.28 108.

The above two examples illustrate that the Texas courts applied the wrong procedural due process standard in dismissing this case.

CONCLUSION

Since scant case law is available, the Supreme Court is requested, through its opinion, to clarify the differences in trying a federal claim in a federal court versus trying the same claim in a state court. The Supreme Court is requested to reverse and remand this case back to the Texas courts in light of its opinion in *Jones v. Bock*, 127 S.Ct. 910 [2007]. Ganesan requests the Court take judicial note of the fact that the Texas courts were repeatedly made aware of the Supreme Court's opinion in *Jones v. Bock*, 127 S.Ct. 910 [2007]. Ganesan requests repayment of all costs and expenses.

July 8, 2008 Apparajan Ganesan, Pro Se

APPENDIX

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Appendix A - Appellate Court Order

ELEVENTH COURT OF APPEALS, Eastland, Texas
APPARAJAN GANESAN, Appellant
V.
FAYE ROSS AND GAYLE ANDERSON, Appellees
No. 11-06-00095, May 10, 2007

On Appeal from the 32nd District Court
Mitchell County, Texas
Trial Court Cause No. 14829

MEMORANDUM OPINION

Apparajan Ganesan is an inmate in the Texas Department of Corrections. Ganesan filed suit in Childress County against several defendants because he was forced to provide a blood sample for DNA purposes. Faye Ross and Gayle Anderson appeared and filed a motion to transfer venue. The trial court granted their motion and transferred the case to Mitchell County. Ross and Anderson then filed a motion to dismiss. The Mitchell County trial court granted this motion and dismissed all claims against them. Ganesan appealed, complaining of the venue transfer and the dismissal order. Because Ganesan did not exhaust his administrative remedies before suing Ross and Anderson, we affirm.

Ganesan was convicted of solicitation to murder his spouse and was sentenced to ten years imprisonment. *See Ganesan v. State*, 45 S.W.3d 197 (Tex. App.—Austin2001, pet. ref d). Ganesan alleges that on May 9, 2002, a DNA sample was forcibly taken from him while he was incarcerated at the Roach Unit FN[1]. He filed a grievance complaining that, because he was convicted of solicitation of murder rather than attempted murder, he was not required to provide a DNA sample. The Texas Department of Criminal Justice and the Texas Department of Public Safety notified him by separate correspondence dated June 19, 2002, that his DNA sample and all records pertaining to it had been destroyed. Ganesan advises this court that he then filed suit in late 2002 against several individuals - but not including Ross or Anderson - to ensure that his records had been purged and to prevent any further attempts to illegally collect a DNA sample. Ganesan was subsequently moved to the Sander Estes Unit, to the Neal Unit, and then to the Wallace Unit. Ganesan alleges that each time he was moved prison officials at the receiving unit attempted to collect a DNA sample. Ganesan contends that on May 25, 2005, after he arrived at the Wallace Unit, Ross and Anderson attempted to obtain a DNA sample and that they threatened him when he did not cooperate. Ganesan added Ross and Anderson as parties on May 31, 2005.

Inmates are provided a grievance system and are required to exhaust their administrative remedies under this system prior to filing suit. TEX. GOV'T CODE ANN. § 501.008 (Vernon 2004). Ganesan's original petition alleged a cause of action under 42 U.S.C. § 1983. Federal law requires inmates to exhaust any available administrative remedy before bringing a Section 1983 action. 42 U.S.C. § 1997e(a). Ganesan's grievance was filed hi 2002, and the relief he requested - destroying his sample and DNA record and providing him with verifiable notification of this action - was granted. The acts he alleges that Ross and Anderson took occurred approximately three years later and, therefore, were not described in that grievance.

Ganesan argues, citing *Johnson v. Johnson,* 385 F.3d 503 (5th Cir. 2004), that he was not required to file a new grievance each time he was moved to a new unit and a new attempt was made to take a DNA sample. *Johnson* involved an individual who alleged that he was repeatedly beaten and sexually assaulted during an eighteen-month period of incarceration. Johnson contended that prison officials failed to protect him by housing him in safekeeping even though they knew that he was at-risk for violence and even though he reported several incidents of violence and abuse. The Fifth Circuit noted that inmates were required to exhaust their administrative remedies so that prison officials were given time and opportunity to address complaints

internally. *Id.* at 516. Because TDCJ officials knew that Johnson was allegedly being repeatedly assaulted and had been denied a transfer to safekeeping status, it was unnecessary for him to file a new grievance after each assault. *Id.* at 521. This ruling/however, was limited to complaints about ongoing physical abuse by the general prison population. The court held that it did not extend to specific allegations of misconduct by two prison guards because Johnson's grievances would not have alerted prison officials to then-behavior or given them the opportunity to remedy any misconduct *Id.* at 522.

Ganesan's 2002 grievance alerted prison officials to his complaint that he had been illegally forced to provide a DNA sample at the Roach Unit. That grievance did not, and obviously could not, have advised them that subsequent attempts would be made to take DNA samples at other units or that other prison officials would improperly threaten him if he did not cooperate. Even considering Ganesan's factual statements that have no supporting record reference and each document in his appendix, there is no indication that Ganesan ever filed a grievance complaining of Ross and Anderson's actions. Consequently, prison officials were never given the opportunity to investigate then" behavior or remedy any misconduct, and Ganesan failed to exhaust his administrative remedies before suing them.

Because Ganesan failed to exhaust his administrative remedies before suing Ross and Anderson, his claims against them are barred by Section 501.008 and Section 1997e(a). The trial court did not err when it granted Ross and Anderson's motion to dismiss. Ganesan's first issue is overruled. This ruling makes it unnecessary to address the remainder of Ganesan's issues. TEX, R. APP.P.47.1.

The judgment of the trial court is affirmed.

PER CURIAM

May 10, 2007
Panel consists of: Wright, C.J.,
McCall, J., and Strange, J.

FN[1] Ganesan's briefing is replete with factual references - but no citations to the record, and his appendix contains documents that are beyond the record. Because the operative facts are clear and undisputed, we will exercise our discretion to consider this material rather than order Ganesan to file briefs in compliance with the rules.

Appendix B – Trial Court Order of transfer

100th District Court, Childress County, Texas
Apparajan Ganesan TDCJ #, 904088, Pro Se v.
Brannigan, Upshaw, Ward, Grahovec & Hawkins,
Case No. 02-8945, Oct. 31, 2005

Order Granting Defendants Faye Ross and Gayle Anderson's Motion Transfer Venue

After considering Defendants Faye Ross and Gayle Anderson's Motion to Transfer Venue, the pleadings and arguments of counsel, the Court GRANTS Defendants Faye Ross and Gayle Anderson's Motion to Transfer Venue and transfers the case in its entirety to Mitchell County.

SIGNED ON Oct 31, 2005.

S/by: David M. McCoy
PRESIDING JUDGE

Appendix C –Trial Court Order of denial

32nd District Court, Mitchell County, Texas
Apparajan Ganesan TDCJ #, 904088, Pro Se v. Brannigan, et. al., Case No. 14,829, Feb. 16, 2006

Order of the Court

Ganesan's request for extension of the time up to March 31, 2006 is denied.

SIGNED ON 2-16-06

S/by: Glen Harrison
PRESIDING JUDGE

Appendix D - Trial Court Order of dismissal

32nd District Court, Mitchell County, Texas
Apparajan Ganesan TDCJ #, 904088, Pro Se v.
Brannigan, et. al., Case No. 14,829, Match. 23, 2006

Order of Dismissal with Prejudice

Be it remember on this day, came on for consideration Defendant Faye Ross and Gayle Anderson's Motion for Dismissal. After reviewing the pleadings the Court finds the motion is well taken and should be in all things GRANTED.

IT IS THEREFORE ORDERED that this cause of action filed by plaintiff against Defendant Faye Ross and Gayle Anderson is hereby dismissed with prejudice as to plaintiff's refiling.

SIGNED this 23 day of March, 2006.

S/by: Glenn Harrison
THE HONORABLE GLENN HARRISON DISTRICT JUDGE PRESIDING

Appendix E - Supreme Court of Texas review denial

Supreme Court of Texas, Austin, Texas
Apparajan Ganesan v. Mike Brannigna, Kelli Ward,
Rene Hawkins, Gayle Anderson, Michael Upshaw,
Patricia Grahovec, Faye Anderson
Case No. 07-0536, 11/09/2007
COA#: 11-06-00095

Today the Supreme Court of Texas denied the petition for review in the above referenced case.

Appendix F – Supreme Court of Texas rehearing denial

Supreme Court of Texas, Austin, Texas
Apparajan Ganesan v. Mike Brannigna, Kelli Ward, Rene Hawkins, Gayle Anderson, Michael Upshaw, Patricia Grahovec, Faye Anderson
Case No. 07-0536, 11/09/2007
COA#: 11-06-00095

Today the Supreme Court of Texas denied the motion for rehearing in the above referenced petition for review.

Appendix G – Judge McCoy Indictment Reports

(source on-line Google search, January 2008)

Judge Faces Charges of Theft by Public Servant

CHILDRESS, Texas — A Panhandle judge facing felony charges was released on his own recognizance Friday, a day after he was indicted.

State District Judge David McCoy, 64, was suspended from the bench following his indictment Thursday on charges of theft by public servant, a second-degree felony punishable by up to 20 years in prison, and abuse of official capacity, a third-degree felony punishable by up to 10 years.

The case has been under investigation for the past several months by the Texas attorney general's office.

McCoy's attorney, Bill Kelly of Canyon, said the charges are without merit.

McCoy turned himself in Friday and was released following the setting of amounts on two personal recognizance bonds; each was set at $5,000, Kelly said.

McCoy served as district attorney in the 100th Judicial District from 1980-1993. Then-Gov. Ann Richards then appointed him district judge after Judge John Forbis resigned. McCoy was elected in 1994 by an overwhelming majority has been re-elected since.

His term is set to expire next year.
The judicial district is made up of Childress, Collingsworth, Cottle, Donley and Carson counties.

District Judge In Trouble

Updated:11/30/2007 12:45:18 PM
David McCoy Indicted

District Judge David McCoy, 64, was indicted Thursday by a Childress County grand jury on two charges. The first charge: Theft by Public Servant, is a second degree felony punishable by 2-20 years in prison. The second charge: Abuse of Official Capacity, is a third degree felony, punishable by 2-10 years in prison.

The Childress County Grand Jury indictment on these charges came as sad news to residents of the 100th Judicial District which he has served as district attorney and later as district judge.

The Grand Jury met in the Childress County

Courthouse from 8 a.m. until 6:40 p.m. McCoy testified before the grand jury which is not normally done, according to his lawyer Bill Kelly.

"It is highly unusual for someone to testify in their own behalf in front of a grand jury, usually cases put before a grand jury are open and shut cases," Kelly said.

McCoy was unavailable for comment. McCoy testified for approximately two hours before the grand jury. After McCoy's testimony, Carson County Sheriff Tam Terry spoke to the grand jury for approximately 20 minutes.

The grand jury deliberated for just under an hour before handing down the indictment on McCoy.

McCoy's future is now seriously in question as his term was to expire next year. Dec. 3 is the filing deadline to seek office again. As of the time of the indictment, McCoy is officially suspended as District Judge.

An acting judge will be brought in on Friday morning to process McCoy where he will be booked into Childress County Jail and allowed the opportunity to post bond.

According to Childress County Sheriff Mike Pigg, McCoy was to be processed at 8:30 a.m. today.

Assistant Texas Attorney Generals representing the state during this process were Harry White and Will Tatum.

McCoy served as district attorney for 13 years - from 1980-1993, when he was appointed district judge by then Governor Ann Richards thus serving in his present position for 14 years. He succeeded Judge John Forbis who resigned as district judge.

McCoy was elected in 1994 by an overwhelming majority in the five counties he serves and has been re-elected each time.

The 100th Judicial District is composed of Childress, Collingsworth, Cottle, Donley and Carson counties, Judge McCoy was scheduled to be in Panhandle (Carson County) today for court.

The case has been under investigation for the past several months by the Texas Attorney General's Office.

Check childressindex.com for developments in this case.

Appendix H - Grievance 2002157289 and TDCJ letters

Texas Department of Criminal Justice

Step 1 OFFENDER GRIEVANCE FORM
Paso 1 Forma Para Quejas de los Preso

Office Use Only
Para Use de La Officiano Solementa
Grievance # 2002157289
Date Received: 5-15-02
Date Due: 6-24-02
Grievance Code: 911
Investigator Number: I0950
__ EM __ UOF __MED
__ ADA __ REL __ SSI

Offender Name: A. Ganesan TDCJ#: 904088
Unit: Roach Housing Assignment: L112B
Unit Where Incident Occurred: Roach

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title)? Mr. Brannigan, Nurse, TDC (?)

When: May 9, 2002 What action was taken? NONE

State your grievance in the space provided. Please state who, what, when, where and disciplinary case number if applicable.

My DNA sample was taken unlawfully. Texas Govt. Code §411.148(a) does not apply to my crime (Texas Penal Code §15.03).

The nurse was correct in stating the law changed. Texas Govt. Code §411.148(a) now reads "An inmate serving a sentence for felony in the Institutional Division shall provide one or more blood samples or other specimens for the purpose of creating a DNA record."

However, the statutory note on Section 4 and 5 states, "The change in the law made by this act to §411.148(a), Government Code, applies only to who begins serving a sentence in the Institutional Division of the Texas Department of Criminal Justice on or after the effective date of this act." I started my sentence in TDC on Feb. 2000. My response from Medical to my internal resolution was "DNA was ordered by TDC, taken, & shipped." I don't know how to grieve TDC. So I am grieving Brannigan as a pass through entity. After all, his organization executed the order (sorry Mr. Brannigan). Perhaps unit grievance investigator can direct this. [stamped] May 15, 2002

Informal resolution I-60 on file but not attached.

Action requested to resolve your complaint:

1)Destroy my blood sample and DNA immediately.
2)Send me verified notification that this has been done.
3)Perhaps there is a way to keep Medical out of 'legal stuff' like this.

Offender signature: S/by: A. Ganesan
Date: May 4, 2002

Administrator's Decision
__ Mandatroy referral to IAD (Grievance Worksheet attached)
__ No action warranted (explain).
This issue has been referred to the designee of the Director of Classification and Records. As soon as a ruling has been made, you will be notified. Please refer to A. D. 3.17, section IV for further clarification.

Signature Authority: S/by: M. Upshaw
Date: Jun 06 2002

If you are dissatisfied with Step 1 response you may submit a Step 2 (I.128) to the Grievance Investigator within 15 days from the Step 1

response. State your reason for appeal on the Step 2 form.

Texas Department of Criminal Justice

Step 2 OFFENDER GRIEVANCE FORM
Paso 2 Forma Para Quejas de los Preso

Office Use Only
Para Use de La Officiano Solementa
Grievance # 2002157289
Date Received: 6-14-02
Date Due: 6-17-02
Grievance Code: 911
Investigator Number: I0950
__ EM __ UOF __ MED
__ ADA __ REL __ SSI

Offender Name: A. Ganesan TDCJ#: 904088
Unit: Roach Housing Assignment: L112B
Unit Where Incident Occurred: Roach

Give reason for appeal (Be specific.). I am dissatisfied with the response at Step 1 because ...

No time limit for the designee of the Director of Classification to respond. Step 2 time limits compel this action.

Accordingly, as per Warden Upshaw's recommendation, I read A. D. 3.17, Section IV.

Remedy by the TDC for false collection of DNA info is to remove the DNA info from te DFS records . At best it is 'minimal.'

The Vernon Code clearly says a Motion to Expunge must be filed against all entities (state, city and federal, national and international) who mignt have had access to that data. Case law further states any provable violation to the contrary, at a future date, initiates a claim.

Since I don't know what the designee of the Director of Classification's response will be, I am just making a timely filing to ensure access to the full remedy available under law, rather than the limited one described in A. D. 3.17 Sec. IV.

Ref.: Vernon Govt. Code §411.151
Remedy being sought is the same as in unreadable.
Step 1 attached # 2002157289

Offender signature: S/by: A. Ganesan
Date: June 13, 2002

Appellate Decision and Reason

__ The Step 1 answer has addressed your complaint. No action will be taken.

__ You have not provided a good reason for your appeal or for this office to review your claim further. No action will be taken.

__ The issue you raise has been resolved or is pending resolution and no further action is warranted.

__ The issues you present have already been reviewed. No further appeals of the issues will be allowed. No action will be taken by this office.

Your complaint in grievance #2002157289 has been reviewed by this office. The Department of Public Safety has verified that your DNA sample has been destroyed. A letter will be sent to you from the Program and Services Department out of Austin. No further action on this issue is warranted. –d-jw

Signature Authority: Kelli Ward Date: Jul 22, 2002

Texas Department of Criminal Justice
---------- Gary L Johnson
Executive Director

June 19, 2002
Apparajan Ganesan
SID# 06005688
TDCJ# 904088
Roach Unit

Dear Mr. Ganesan:

Enclosed please find verification from the Texas Department of Public Safety that your DNA sample and all records pertaining to it have been destroyed and expunged.

Sincerely,
S/by: Patti Grahovec
Patti Grahovec
Program Specialist

PG/cs
Encl. (1)

P.O. Box 13401, Capitol Station
Austin, Texas 78711
Tdcj.state.tx.us

TEXAS DEPARTMENT OF PUBLIC SAFETY
CRIME LABORATORIES SERVICES MSC 0461
PO BOX 4143
AUSTIN, TEXAS 78765-0461
512-434-2105

THOMAS A. DAVIS, JR
DIRECTOR
DAVID MACEATHRON
FRANICE WALKER
ASST. DIRECTORS

COMMISSION
COLLENE MCHUGH
CHAIRMAN
ROBERT R. HOLT
JAMES B. FRAQNCIS, JR
COMMISIONERS

June 19, 2002

Ms. Patricia Grahovac

TDCJ Programs and Services Administrator – DNA Testing

Dear Patricia,

As per your request, blood samples and all other documentation for the following offender were destroyed and/or expunged from the CODIS laboratory files

Name	SID#
Ganesan, Apparajan	06005688

Please call if you have any questions.

Sincerely,
S/by: Renee Hawkins
Renee Hawkins
CODIS Interagency Liaison
CODIS Program

Appendix I – Communication with Shufelt

To
Mr. Shulfelt (Grievance Officer)
Sanders Estes Unit
1100 Hwy 1807

Copy To
Mr. Doug Marsh
1031 Graham St.
Bethlehem, PA 18015

Date Oct. 28, 2002
Dear Sir,

Two days ago, you informed me, that my DNA problems were due to the TDC computer having the wrong "crime code" for my offense. Importantly, the same "crime code" has been used by parole to deny me parole. (Mr. Marsh had corrected a similar problem for me months ago.); the reasons given have no bearing to my case. Would you kindly document your findings; I intend to copy your findings to parole so that I can go home as soon as possible. Your prompt action is appreciated.

Regards
S/by: A. Ganesan
904088
APPARAJAN GANESAN

[Shufelt Response] OCT 29 2002
I contacted Classification and Records in Huntsville and asked a Ms. Walker to look at your problem. I faxed her the letters in your file and she looked at the problem. She told me that your NCIC code and

penal citation were incorrect and had now been corrected.

R. Shufelt

Appendix J – Communications with Mitchell County re appeal to US Supreme Court

SHARON HAMMOND
Mitchell County District Clerk
349 Oak Street, Room 302
Colorado City, TX 79512

January 18,2008

Apparajan Ganeson
TDCJ #904088
Polunsky Unit
3872 2 FM 350 South
Livingston, TX 77351

Re: No. 14,289, 32nd District Court
Mitchell County, Texas
Ganesan vs. Brannigan, et al

Dear Mr. Ganeson,

This letter is to inform the parties that the Court, pursuant to Rule 165a, TRCP and the time and standards promulgated by the Supreme Court, has scheduled the above styled and numbered cause for a dismissal hearing on March 13, 2008, at 10:00 A.M

The cause of action against Defendants Faye Ross and Gayle Anderson has been dismissed with prejudice by

Court Order signed March 23, 2006. The Court shall dismiss the remainder of the defendants for want of prosecution unless there is good cause for this case to be maintained on the docket.

Respectfully,

S/by: SH

Sharon Hammond

Date January 24, 2008

To
Ms. Sharon Hammond
Mitchell County District Clerk
349 Oak Street Room 302
Colorado City, TX 79512

Copy To
D. G. Marsh
1031 Graham St.
Bethlehem, PA 18015-2520

RE: Case No. 14,289 Ganesan v. Brannigan, et al

Dear Clerk:

The Texas Supreme Court ruled on this case on 1/11/08and a Writ Of Certioari to the US Supreme Court will be filed on 4/2/08 (<90 days). Depending upon the US Supreme Court's decision, this case may take many turns, one of which is venue going back to Childress County. Under the circumstances we would prefer to wait for the US Supreme Court's decision before we initiate any further service. Kindly do not dismiss this case until we hear from the US Supreme Court which will be after April 1, 2008. So please remove this case from the hearing docket on March 13, 2008. Thanks.

Sincerely

S/by: Apparajan Ganesan
Apparajan Ganesan
904088 Polunsky
3872 FM 350 S
Livingston, TX 77351

Appendix K - Communications with Court of Appeals, 11th District of Texas

Court of Appeals

Eleventh District of Texas

100 WEST MAIN STREET
P.O. BOX 271 EASTLAND, TEXAS 76448

April 11, 2007

JIM R. WRIGHT
CHIEF JUSTICE

TERRY MCCALL
JUSTICE

RICK STRANGE
JUSTICE

SHERRY WILLIAMSON
CLERK
TELE: 254/629-2638
FAX: 254/629-2191
sherry .williamson@courts.state.tx.us
www.11thcoa.courts.state.tx.us

Apparajan Ganesan TDCJ # 904088 Polunsky Unit
3872 FM 350 South Livingston, TX 773 51

Amanda C. Gohlke Davis & Davis Attorneys at Law
P.O. Box 1588 Austin, TX 78767

RE: Appellate Case Number: 11-06-00095-CV
Trial Court Case Number: 14829
Style: Apparajan Ganesan Brannigan, Upshaw, Ward, Grahovec & Hawkins et al

We have this day received the record from the Supreme Court in which Petition for Reviedw was denied in the above cause.

Our court will issue mandate no sooner than fifteen days from the date of this letter.

Respectfully yours,
Sherry Williamson, Clerk
S/by: Diana Reynolds
By: Diana Reynolds, Deputy

Date Feb 8, 2008

To
Court of Appeals
11th District of Texas
100 West Main Street,
Suite 300
PO Box 271, Eastland, TX 76448

Copy To
D.G. Marsh
1031 Graham St.
Bethlehem, PA 18015-2520

RE: 11-06-00095-CV, Ganesan v. Brannigan et al
Trial Court No 14829

Dear Court:

1. Your letter dated 1/28/08, mailed on 2/4/08 and received on Friday 2/8/08 at 9 am.
2. The Texas Supreme Court ruled on 1/11/08 and a Writ of Certerioari to the US Supreme Court will be filed around 4/2/08 (ninety days). This is currently being prepared.
3. Were the US Supreme Court to return this case to the Texas courts, in addition to the exhaustion question, this court will be forced to address the venue question in light of Gallagher v Scott 209 SW3d 262 [2006], HN 1-5. For the above reasons, the court is requested to stay its mandate.

Respectfully Submitted
S/by: Apparajan Ganesan
Apparajan Ganesan
904088 Polunsky
3872 FM 350 S
Livingston, TX 77351

Appendix L – Law, Etc. upon which Argument is based

1. 42 USC §1983 CHAPTER 21 SUBCHAPTER I
§ 1983. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. 42 USC §1997e(a) CHAPTER 21 SUBCHAPTER I-A
INSTITUTIONALIZED PERSONS
Sec. 1997e. Suits by prisoners

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

3. Federal Civil Judicial Procedure and Rules, Rules 24(a), 24(b)

RULE 24 (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

RULE 24 (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when the applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a

federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

4. Texas Rules of Civil Procedure, Rules 60, 61

RULE 60. INTERVENOR'S PLEADINGS

Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.

RULE 61. TRIAL: INTERVENORS: RULES APPLY TO ALL PARTIES

These rules of pleading shall apply equally, so far as it may be practicable to intervenors and to parties, when more than one, who may plead separately.

5. VTCA Govt. Code §501.008 Subchapter A

§ 501.008. INMATE GRIEVANCE SYSTEM.

(a) The department shall develop and maintain a system for the resolution of grievances by inmates housed in facilities operated by the department or under contract with the department that qualifies for certification under 42 U.S.C[0] Section 1997e and the department shall obtain and maintain certification under

that section. A remedy provided by the grievance system is the exclusive administrative remedy available to an inmate for a claim for relief against the department that arises while the inmate is housed in a facility operated by the department or under contract with the department, other than a remedy provided by writ of habeas corpus challenging the validity of an action occurring before the delivery of the inmate to the department or to a facility operated under contract with the department.

(b) The grievance system must provide procedures:

(1) for an inmate to identify evidence to substantiate the inmate's claim; and

(2) for an inmate to receive all formal written responses to the inmate's grievance.

(c) A report, investigation, or supporting document prepared by the department in response to an inmate grievance is considered to have been prepared in anticipation of litigation and is confidential, privileged, and not subject to discovery by the inmate in a claim arising out of the same operative facts as are alleged in the grievance.

(d) An inmate may not file a claim in state court regarding operative facts for which the grievance system provides the exclusive administrative remedy until:

(1) the inmate receives a written decision issued by the highest authority provided for in the grievance system; or

(2) if the inmate has not received a written decision described by Subdivision (1), the 180th day after the date the grievance is filed.

(e) The limitations period applicable to a claim arising out of the same operative facts as a claim for which the grievance system provides the exclusive remedy:

(1) is suspended on the filing of the grievance; and

(2) remains suspended until the earlier of the following dates:

(A) the 180th day after the date the grievance is filed; or

(B) the date the inmate receives the written decision described by Subsection (d)(1).

(f) This section does not affect any immunity from a claim for damages that otherwise exists for the state, the department, or an employee of the department.

Added by Acts 1989, 71st Leg., ch. 212, § 2.01, eff. Sept. 1, 1989. Renumbered from § 500.008 and amended by Acts 1991, 72nd Leg., ch. 16, § 10.01(a), eff. Aug. 26, 1991. Amended by Acts 1995, 74th Leg., ch. 378, § 6, eff. June 8, 1995.

6. VTCA Civil Practice and Remedies Code §14.005

CHAPTER 14. INMATE LITIGATION

Sec. 14.005. GRIEVANCE SYSTEM DECISION; EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) An inmate who files a claim that is subject to the grievance system established under Section 501.008, Government Code, shall file with the court:

(1) an affidavit or unsworn declaration stating the date that the grievance was filed and the date the written decision described by Section 501.008(d), Government Code, was received by the inmate; and

(2) a copy of the written decision from the grievance system.

(b) A court shall dismiss a claim if the inmate fails to file the claim before the 31st day after the date the inmate receives the written decision from the grievance system.

(c) If a claim is filed before the grievance system procedure is complete, the court shall stay the proceeding with respect to the claim for a period not to exceed 180 days to permit completion of the grievance system procedure.

Added by Acts 1995, 74th Leg., ch. 378, Sec. 2, eff. June 8, 1995.